

***United States Court of Appeals
for the Second Circuit***



JOINT APPENDIX

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WITH PROOF
OF SERVICE

77-7066

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

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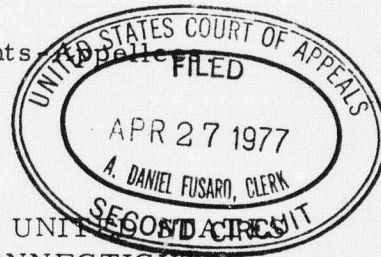
WALTER PARSELL and VIOLET PARSELL,
GEORGE HOOPER,
HOUSATONIC MARINA, INC., SHELLFISH
LABORATORY, a partnership by EDWIN C.
FORDHAM, partner and EDWIN C. FORDHAM,
EAST END YACHT CLUB, INC., individually
and on behalf of various pleasure boat owners,

Plaintiffs-Appellants,

-against-

SHELL OIL COMPANY and BUCKLEY BROS.,

Defendants-Appellees



ON APPEAL FROM AN ORDER OF THE UNITED
DISTRICT COURT, DISTRICT OF CONNECTICUT

JOINT APPENDIX

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(6198A)

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TABLE OF CONTENTS

	Page
Relevant Docket Entries	A-1
Complaint	A-3
Motion to Strike Demand for Jury	A-8
Ruling on Motion to Strike Demand for Jury	A-9
Ruling on Motion to Certify Interlocutory Appeal	A-26
Order of Court of Appeals Granting Leave to Appeal pursuant to 28 U.S.C. §1292(b)	A-28

RELEVANT DOCKET ENTRIES (Civil B-700)

- 2/5/73 - Complaint filed. Rule 23 Allegation. Demand for trial by jury.
- 2/23/76 - Defendants' Motion to Strike Plaintiffs' Demand for Trial by Jury, filed.
- 2/23/76 - Defendants' Memorandum in Support of Motion to Strike Demand for Jury Trial, filed.
- 5/21/76 - Plaintiffs' Memorandum in Opposition to Motion to Strike Demand for Jury Trial, filed.
- 10/19/76 - RULING ON MOTION TO STRIKE DEMAND FOR JURY TRIAL, filed and entered. Since neither the Rivers and Harbors Appropriations Act nor the federal common law of water pollution affords a basis for invoking federal jurisdiction for a damage action brought by private plaintiffs for pollution not affecting interstate interests, the case must remain on the admiralty side of the Court. Defendants' motion to strike the jury demand is therefore granted. NEWMAN, J. M-10/20/76.
Copies to counsel.

Date Ord
Judgment.

COMPLAINT

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BEST COPY AVAILABLE

-----X

WALTER PARSELL and VIOLET PARSELL,
GEORGE INOGER,
ECUSATONIC MARINA, INC., SHELLFISH
LABORATORY, a partnership by EDWIN
C. FORDHAM, partner and EDWIN C.
FORDHAM,
EAST END YACHT CLUB, INC.,
individually and on behalf of
various pleasure boat owners,

PLAINTIFFS DEMAND
A TRIAL BY JURY

Plaintiffs,

COMPLAINT

-against-

SHELL OIL COMPANY and BUCKLEY BROS.,

Defendants.

-----X

Plaintiffs, complaining of the defendants, by their
attorneys GOLDMAN & ROSEN (JACOB RASSNER, Of Counsel) respect-
fully show to this Court as follows:

FIRST: That pursuant to stipulation by counsel for all
the parties hereto and the approval of the Hon. HAROLD R. TYLER,
Jr., United States District Judge, the actions wherein the above
named are plaintiffs, pending in the United States District Court
for the Southern District of New York, were consolidated for all
purposes in said Court, and in a deposition of Dale Wolf, as a
witness, taken on September 24, 1971 in an examination before
trial of the defendant, Shell Oil Company, it was stipulated
by all counsel in the actions pending in the United States
District Court for the Southern District of New York, as well as
by Whitney Biggs, of counsel for Pullman, Conley, Bradley &
Reeves, Esqs., attorneys for Buckley Bros., that the said
deposition would be applicable to all cases by the plaintiffs
named in this action.

SECOND: Jurisdiction is based on damages due to a maritime tort by the carrying of a cargo of oil by a tankship and causing the oil to escape or spill from the tanks up onto the navigable waters of the United States, without having taken any or adequate precautions to provide for the safe carriage and delivery of cargo by ship without the danger of it spilling on to the navigable waters of the United States as it was being delivered from the ship to shore facilities. 33 U.S.C. § 407.

THIRD: That the plaintiffs WALTER PARSELL and VIOLET PARSELL are residents and citizens of the State of Connecticut.

FOURTH: That the plaintiff GEORGE HOOPER is a resident and citizen of the State of Connecticut.

FIFTH: That the plaintiff HOUSATONIC MARINA, INC., SHELLFISH LABORATORY was and is a partnership, of which plaintiff EDWIN C. FORDHAM is a partner, and is duly licensed to do business in the State of Connecticut.

SIXTH: That the plaintiff EAST END YACHT CLUB, INC., is a corporation duly organized and existing under and by virtue of the laws of the State of Connecticut.

SEVENTH: That at all the times hereinafter mentioned, the defendant SHELL OIL COMPANY was a foreign corporation, duly licensed to do business in the State of Connecticut.

EIGHTH: That at all the times hereinafter mentioned, the defendant BUCKLEY BROS., upon information and belief, is a domestic corporation, duly organized and existing under and by virtue of the laws of the State of Connecticut.

NINTH: That at all the times hereinafter mentioned, the defendant BUCKLEY BROS., owned, operated and controlled a

certain split terminal or a portion thereof as a sales arm of Buckley Bros., as well as a terminal operator to take in cargos of products to be put through for defendant SHELL OIL COMPANY.

TENTH: That at all the times hereinafter mentioned, the defendant SHELL OIL COMPANY owned, operated and controlled certain cargo ships which were engaged in delivery and did deliver oil to the premises of the defendant BUCKLEY BROS., aforementioned.

ELEVENTH: That at all the times hereinafter mentioned, and for sometime prior thereto, cargos of oil were brought by the defendant SHELL OIL COMPANY to the terminal of the defendant BUCKLEY BROS., and that lines from the ship's compartments would be connected by the defendants jointly with the assistance of the agents, servants and employees of both defendants, including the ships crew and defendant BUCKLEY BROS. terminal personnel, utilizing the ship's pumps to pump the petroleum off the ship through the cargo lines owned, operated and controlled by the defendant BUCKLEY BROS.

TWELFTH: That it was the duty of the defendants and each of them to make certain that the connections of the lines were properly made from the ship to the terminal, including the proper lining up of the valves so that the oil product would get to the right tank in the Eagles Nest Tank Farm.

THIRTEENTH: That at all the times hereinafter mentioned, the ship's pumps had been put into and were operated by the ship's crew and power on the orders of the agents, servants and employees, signals and control of the defendant BUCKLEY BROS.

FOURTEENTH: That on or about the 14th day of June, 1970, certain petroleum cargo was delivered by tankship owned

or chartered by defendant SHELL OIL COMPANY to the defendant BUCKLEY BROS., and the tankship dock at Buckley Bros., main cargo dock.

FIFTEENTH: That on or about the 15th day of June, 1970 there was a discharge of a large quantity of oil on to Johnson's Creek area.

SIXTEENTH: That the oil spill was due to one valve which was left open due to improper alignment, which should have been closed, resulting in an oil spill of 655,000 gallons or more.

SEVENTEENTH: That as a result of the foregoing, each of the plaintiffs were caused to suffer extensive damage to their real and personal property, including equipment and products, and caused to suffer loss and impairment of business and other damage of a continuous and continuing nature by reason of foul smelling oil soaking into the plaintiffs' facilities and causing foul odors to emanate from plaintiffs' products and equipment, and causing destruction of and killing of fish, shell fish and fish food, and rendering plaintiffs' properties unfit for their respective intended businesses and purposes, causing the plaintiffs to suffer damage and loss of business and impairment of future business, all to their damage, each in excess of Ten Thousand (\$10,000.00) Dollars.

WHEREFORE, plaintiffs demand judgment against the defendants herein, each in excess of Ten Thousand (\$10,000.00) Dollars, together with the costs and disbursements of this action.

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JACOB RASSNER,
Of Counsel.

MOTION TO STRIKE DEMAND FOR JURYUNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

WALTER PARSELL, ET AL,

Plaintiffs

VS.

SHELL OIL COMPANY, ET AL,

Defendants

CIVIL ACTION NO. B-700

FEBRUARY 18, 1976

MOTION TO STRIKE PLAINTIFFS' DEMAND FOR TRIAL BY JURY

The above-captioned action filed on February 5, 1973 demands a jury trial which demand is set forth on page 1 of the complaint. For the reasons more fully set forth in the memorandum in support hereof, it is respectfully requested that plaintiffs' demand for trial by jury be stricken as jurisdiction must be based upon 28 U.S.C. §1333 under which there is no right to a trial by jury.

THE DEFENDANTS,

By

Dion W. Moore
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RULING ON MOTION TO STRIKE DEMAND FOR JURY

FILED

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U. S. DISTRICT COURT
NEW HAVEN, CONN.

MICROFILM

OCT 20 1976

BRIDGEPORT

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

WALTER PARSELL, ET AL :

V. : CIVIL NO. B-700

SHELL OIL COMPANY, ET AL :

RULING ON MOTION TO
STRIKE DEMAND FOR JURY TRIAL

Defendants' motion to strike plaintiffs' jury demand

in this oil spill case raises important questions concerning the availability of federal jurisdiction for water pollution claims. The plaintiffs in this action claim damages for injuries arising out of an oil spill in Bridgeport harbor in 1970. The complaint alleges that while a cargo of oil was being pumped off a cargo ship to a terminal operated by the defendant Buckley Bros., an improper alignment of a valve caused a discharge of 655,000 gallons of oil into the navigable water of the harbor.

A previous motion to dismiss for lack of federal jurisdiction has been denied, the magistrate finding that whatever other bases of jurisdiction may exist, the complaint, at least alleged a cause of action in admiralty. Further consideration of available bases of federal jurisdiction is now required by defendant's motion to strike the demand for a jury trial. For if the sole basis for federal jurisdiction is admiralty, the plaintiffs have no right to a jury trial, while if a separate and independent basis for federal

jurisdiction exists to support a claim for damages at law, the jury demand must be honored.^{1/} Fed. R. Civ. P. 28; 7A Moore's Federal Practice ¶ 0.59[3]. Since there is no diversity of citizenship, it is necessary to examine plaintiffs' claim that jurisdiction may be founded on 28 U.S.C.A. § 1331.

Section 1331 clearly does not provide federal question jurisdiction for an admiralty claim, Romero v. International Terminal Operating Co., 358 U.S. 354 (1959). Plaintiffs argue, however, that they have stated a cause of action arising under the laws of the United States within the meaning of § 1331 for two separate reasons. First, they assert that they have an implied federal civil remedy under § 13 of the Rivers and Harbors Appropriation Act of 1899, 33 U.S.C.A. § 407. Second, they argue that they have a claim arising under a federal common law of water pollution, which may be recognized for the purpose of § 1331 under the doctrine of Illinois v. City of Milwaukee, 406 U.S. 91 (1972).

Do the plaintiffs have an implied private right of action under 33 U.S.C.A. § 407?

The federal statute that plaintiffs allege affords them a basis for federal jurisdiction makes it unlawful to discharge refuse matter into navigable waters.^{2/} Although private parties have brought suits under § 407 and companion sections of the Rivers and Harbors Appropriation Act, their success in previous cases is not controlling on the present issue. Many of the cases invoking § 407 were brought in admiralty and thus did not require consideration of whether a

federal question claim at law existed.^{3/} In general these cases invoked the Act to support a standard of care rather than to provide a cause of action arising under federal law.

The cases finding a private right of action under other sections of the Rivers and Harbors Appropriation Act^{4/} are not controlling on the question of the existence of such a right under § 407. The statutory provisions involved in these cases, 33 U.S.C.A. §§ 401, 403, and 406, contain an express grant of jurisdiction to the district courts to grant injunctive relief for violations of those provisions. The absence of such a remedy in § 407 renders these cases doubtful authority for finding an implied right of action under this provision.

With the recent growth of environmental litigation in the federal courts, attempts to find some sort of private right of action implied under the 1899 statute have increased.^{5/} Our circuit left this disputed issue open in Connecticut Action Now, Inc. v. Roberts Plating Co., 457 F.2d 81 (2d Cir. 1972). But other cases that have recognized or denied a private right of action under federal regulatory statutes shed light on whether such a right can be found in § 407. See, e.g., J.I. Case Co. v. Borak, 377 U.S. 426 (1964); Reitmeister v. Reitmeister, 162 F.2d 691 (2d Cir. 1947); Fischman v. Raytheon Mfg. Co., 188 F.2d 783 (2d Cir. 1951); Fitzgerald v. Pan American World Airways, 229 F.2d 499 (2d Cir. 1956); Colonial Realty Corp. v. Bache & Co., 358 F.2d 178 (2d Cir. 1966); Ivy Broadcasting Co. v. American Telephone

& Telegraph Co., 391 F.2d 486 (2d Cir. 1968). These cases set forth a general doctrine "which, in the absence of contrary implications, construes a criminal statute, enacted for the protection of a specified class, as creating a civil right in members of the class, although the only express sanctions are criminal." Reitmeister v. Reitmeister, supra at 694. But they also make clear that "contrary implications" may be found in "the nature of the particular rule and its place in the regulatory scheme." Colonial Realty Corp. v. Bache & Co., supra at 182. The Supreme Court set forth the proper standards for judging a particular statute in Cort v. Ash, 422 U.S. 66, 78 (1975):

In determining whether a private remedy is implicit in a statute not expressly providing one, several factors are relevant. First, is the plaintiff "one of the class for whose especial benefit the statute was enacted," -- that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law? [citations omitted].

Consideration of the statute in light of these criteria makes it clear that even though the statute explicitly condemns certain conduct, Congress intended to place responsibility for its enforcement somewhere other than in private hands.

Section 407, which makes discharge of refuse illegal, must be read together with the companion sections of the Rivers and Harbors Appropriation Act providing for enforcement. Section 411 of the Act provides that a violation of § 407 shall be punished by fine or imprisonment or both, and also provides that one-half of such fine shall be paid to the person or persons giving information leading to conviction.^{6/} Section 413 of the Act makes it the duty of the Department of Justice to enforce the Act and the duty of United States attorneys to prosecute whenever requested to do so by certain designated officials.^{7/} This statutory scheme evinces an intent to lodge enforcement responsibility solely in the Department of Justice, which can make discretionary prosecutorial decisions taking into account the effects of other federal water quality legislation.^{8/} Congress has not authorized "private attorneys-general" to enforce this section. For this reason every court which has considered the question has denied to private plaintiffs the right to bring an action under the Act to recover in a qui tam action the percentage of the fine which they might have been entitled to receive as informers if an offense had been prosecuted to conviction.^{9/} Our circuit has taken this position in Connecticut Action Now, Inc. v. Roberts Plating Co., supra, stating: "It is hard to look at [the statutory] pattern except as a mandate that the Federal Government is to be the initiator of the proceeding." 457 F.2d at 85. See also Hooper v. United States, 331 F. Supp. 1056 (D. Conn. 1971); Morris v. Tennessee Valley

Authority, 345 F. Supp. 321 (N.D. Ala. 1972).

While the Second Circuit reserved decision on the question of a private right of action for compensatory damages, its reasoning on the issue of a private suit for the informer's half of the fine is persuasive as to damages as well. Many of the persons in possession of information that could help the Government convict violators would be injured persons as well. If they could bring their own private suit for compensation, it would seem to follow that the informer's reward should be granted in the same proceeding, since all issues of law and fact with the exception of burden of proof would be the same or closely related. Yet it is the unanimous opinion of the federal courts that have considered the question that the Department of Justice must be the initiator of the proceeding. The informer's status as injured person has not enhanced his rights under the statute.^{10/}

Several courts have directly confronted the question of an implied right of action in favor of a private party personally injured by a violation of § 407. Guthrie v. Alabama By-Products Co., 328 F. Supp. 1140 (N.D. Ala. 1971), aff'd, 456 F.2d 1294 (5th Cir. 1972), cert. denied, 410 U.S. 946 (1973); Lavagnino v. Porto-Mix Concrete, Inc., 330 F. Supp. 323 (D. Colo. 1971); and Chambers-Liberty Counties Navigation District v. Parker Bros. & Co., 263 F. Supp. 602 (S.D. Tex. 1967),^{11/} declined to find a private right of action under § 407, at least where the allegations of the complaint did not include obstruction of navigation. Justification for

limiting any private right of action to cases involving navigation was found in the legislative history of the 1899 Act. As in these cases, there is no allegation of obstruction of navigation in the present case.^{12/}

Under the standards set by the Supreme Court in Cort v. Ash, supra, it would be inappropriate to find a private right of action implied under § 407 of the Rivers and Harbors Appropriation Act of 1899. The "class for whose especial benefit the statute was enacted" is the public at large rather than any particular private parties.^{13/} The legislative intent, as manifested by the scheme of enforcement through criminal prosecutions, is to leave the prosecutorial responsibility exclusively with the Department of Justice. Implication of a private remedy would upset the criminal enforcement system of this Act and the other federal water quality statutes, and would be inconsistent with the unanimous judicial construction that informer's fines be awarded only after a criminal prosecution has taken place. Finally, state law of nuisance and federal admiralty law provide ample traditional remedies, so that the Court's decision on this point does not leave the plaintiff without any redress. The Court does no more than hold that § 407 does not create a private cause of action under the laws of the United States so as to provide an independent basis for federal jurisdiction outside of admiralty.

Do the plaintiffs have a right of action under the federal common law of water pollution?

Plaintiffs urge that Illinois v. Milwaukee, 406 U.S.

91 (1972), requires a finding of federal question jurisdiction for § 1331 purposes on the theory that the claim arises under the federal common law of water pollution. The broadest possible reading of that decision would give considerable support to the plaintiffs. But at least three important factors were present in Illinois v. Milwaukee and are not present here. The first was the fact that the plaintiff was a governmental entity; the second was the interstate nature of the pollution involved; and the third was the claim in that case for equitable relief.

In Illinois v. Milwaukee the plaintiff was a state. Further, in the cases cited by the Supreme Court in support of its holding, state plaintiffs were likewise involved. The Court quoted a passage from Georgia v. Tennessee Copper Co., 206 U.S. 230, 238 (1907), highlighting the significance of the plaintiff's sovereign status:

It is a fair and reasonable demand on the part of a sovereign that the air over its territory should not be polluted on a great scale by sulphurous acid gas, that the forests on its mountains, be they better or worse, and whatever domestic destruction they have suffered, should not be further destroyed or threatened by the act of persons beyond its control, that the crops and orchards on its hills should not be endangered from the same source. If any such demand is to be enforced this must be, notwithstanding the hesitation that we might feel if the suit were between private parties, and the doubt whether for the injuries which they might be suffering to their property they should not be left to an action at law.

As the Court in Milwaukee stated:

Thus, a State with high water-quality standards may well ask that its strict

standards be honored and that it not be compelled to lower itself to the more degrading standards of a neighbor. 406 U.S. at 107.

Several recent cases have extended the federal common law of nuisance action beyond cases brought by states as plaintiffs to include cases brought by the United States. See, e.g., United States v. Ira S. Bushey & Sons, Inc., 346 F. Supp. 145 (D. Vt. 1972); 363 F. Supp. 110 (D. Vt. 1973), aff'd, 487 F.2d 1393 (2d Cir. 1973), cert. denied, 417 U.S. 976 (1976); United States v. United States Steel Corp., 356 F. Supp. 556 (N.D. Ill. 1973); United States v. Stoeco Homes, Inc., 498 F.2d 597, 611 (3d Cir. 1974), cert. denied, 420 U.S. 927 (1975); see also Stream Pollution Control Board of Indiana v. United States Steel Corp., 512 F.2d 1036, 1040, n.9 (7th Cir. 1975). But this right of action has not been extended to suits brought by private plaintiffs. Thus in Committee for the Consideration of the Jones Falls Sewage System v. Train, 375 F. Supp. 1148 (D. Md. 1974), the Court agreed with the defendants that individuals and citizen associations could not bring an action based on the federal common law of nuisance.

Even if, as some commentators have urged,^{14/} the federal nuisance law right of action should be extended to private plaintiffs, at the very least this right of action should be limited to suits involving pollution with an impact on more than one state. In Illinois v. Milwaukee the discharges flowed from the state of Wisconsin to the state of Illinois and had an adverse impact on persons living in the

state of Illinois. In contrast, although the oil spill involved here took place in navigable waters, no interstate effect^{15/} is alleged in the complaint. The impact of the spill appears to have been limited to Bridgeport Harbor. See Reserve Mining Co. v. Environmental Protection Agency, 514 F.2d 492, 520 (1975), in which the Court rejected the federal common law of nuisance as a basis of relief because "federal nuisance law contemplates, at a minimum, interstate pollution of air or water." The Court noted that neighboring states had not complained and no effects outside the Silver Bay, Minnesota, area were alleged.

It will take a clearer indication than the opinion in Illinois v. Milwaukee to persuade me that the Supreme Court intends federal jurisdiction for a common law claim to be available for every incident of pollution involving navigable waters.

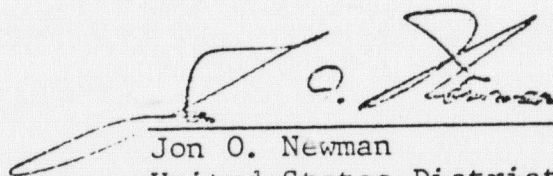
Finally, there is some justification for limiting any right of action under Illinois v. Milwaukee to private parties seeking injunctive relief rather than damages.^{16/} Part of the reason why the Supreme Court encouraged the development of the federal common law of water pollution in Milwaukee was the need for resolution of intricate and highly important questions of the appropriate water quality standards to apply. As the Court said, "these will be equity suits in which the informed judgment of the chancellor will largely govern." 406 U.S. at 107-108. A jury awarding damages in an oil spill case with wholly intrastate impact would be

contributing to the development of evolving water quality standards only in the most ad hoc way.

Conclusion

Since neither the Rivers and Harbors Appropriations Act nor the federal common law of water pollution affords a basis for invoking federal jurisdiction for a damage action brought by private plaintiffs for pollution not affecting interstate interests, the case must remain on the admiralty side of the Court. Defendants' motion to strike the jury demand is therefore granted.

Dated at New Haven, Connecticut, this 19 day of October, 1976.

A handwritten signature in dark ink, appearing to read "Jon O. Newman", is written over a horizontal line. The signature is stylized with a large, sweeping initial "J".

Jon O. Newman
United States District Judge

FOOTNOTES

1/ The plaintiffs have not suggested that there are pendent state law claims which a jury should hear. The complaint is in one cause of action, characterized in the jurisdictional allegations as a "maritime tort."

2/ 33 U.S.C.A. § 407 reads as follows:

It shall not be lawful to throw, discharge, or deposit, or cause, suffer, or procure to be thrown, discharged, or deposited either from or out of any ship, barge, or other floating craft of any kind, or from the shore, wharf, manufacturing establishment, or mill of any kind, any refuse matter of any kind or description whatever other than that flowing from streets and sewers and passing therefrom in a liquid state, into any navigable water of the United States, or into any tributary of any navigable water from which the same shall float or be washed into such navigable water; and it shall not be lawful to deposit, or cause, suffer, or procure to be deposited material of any kind in any place on the bank of any navigable water, or on the bank of any tributary of any navigable water, where the same shall be liable to be washed into such navigable water, either by ordinary or high tides, or by storms or floods, or otherwise, whereby navigation shall or may be impeded or obstructed.

3/ See, e.g., Acme Boat Rentals, Inc. v. J. Ray McDermott & Co., 424 F.2d 393 (5th Cir. 1970); Burgess v. M/V Tamano, 370 F. Supp. 247 (D. Me. 1973); Lauritzen v. Chesapeake Bay Bridge & Tunnel Dist., 259 F. Supp. 633 (E.D. Va. 1966); Gulf Atlantic Transp. Co. v. Becker County Sand & Gravel Co., 122 F. Supp. 13 (E.D.N.C. 1954); Maier v. Publicker

Commercial Alcohol Co., 62 F. Supp. 161 (E.D. Pa. 1945), aff'd, 154 F.2d 1020 (3d Cir. 1946).

4/ See, e.g., Neches Canal Co. v. Miller & Vidor Lumber Co., 24 F.2d 763 (5th Cir. 1928); Lauritzen v. Chesapeake Bay Bridge & Tunnel Dist., 259 F. Supp. 633 (E.D. Va. 1966); Sierra Club v. Leslie Salt Co., 354 F. Supp. 1099 (N.D. Cal. 1972); Sierra Club v. Morton, 400 F. Supp. 610 (N.D. Cal. 1975); Potomac Riv. Assn., Inc. v. Lundeberg Maryland Seamanship School, Inc., 402 F. Supp. 344 (D. Md. 1975).

5/ Annot., Right of Private Party to Sue Polluter, 15 A.L.R. Fed. 636; Note, Environmental Law -- Private Remedies for Pollution of Navigable Waters, 50 No. Car. L. Rev. 153 (1971).

6/ Every person and every corporation that shall violate, or that shall knowingly aid, abet, authorize, or instigate a violation of the provisions of sections 407, 408, and 409 of this title shall be guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding \$2,500 nor less than \$500, or by imprisonment (in the case of a natural person) for not less than thirty days nor more than one year, or by both such fine and imprisonment, in the discretion of the court, one-half of said fine to be paid to the person or persons giving information which shall lead to conviction.

7/ The Department of Justice shall conduct the legal proceedings necessary to enforce the provisions of sections 401, 402, 404, 406, 407, 408, 409, 411, 549, 686, and 687 of this title; and it shall be the duty of United States attorneys to vigorously prosecute all offenders against the same whenever requested to do so by the Secretary of the Army or by any of the officials hereinafter designated . . . and for the better enforcement of

the said provisions and to facilitate the detection and bringing to punishment of such offenders, the officers and agents of the United States in charge of river and harbor improvements, and the assistant engineers and inspectors employed under them by authority of the Secretary of the Army, and the United States collectors of customs and other revenue officers shall have power and authority to swear out process, and to arrest and take into custody, with or without process, any person or persons who may commit any of the acts or offenses prohibited by the said sections, or who may violate any of the provisions of the same . . .

8/ Fed. Water Pollution Control Act, 62 Stat. 1155, 33 U.S.C. § 1151; National Environmental Policy Act of 1969, 83 Stat. 852, 42 U.S.C. § 4321 et seq.

9/ Connecticut Action Now, Inc. v. Roberts Plating Co., 457 F.2d 81 (2d Cir. 1972); Hughes v. Ranger Fuel Corp., 467 F.2d 6 (4th Cir. 1972); Jacklovich v. Interlake, Inc., 458 F.2d 923 (7th Cir. 1972); Anderson v. Norfolk & Western Ry., 349 F. Supp. 121 (W.D. Va. 1972); Gerbing v. I.T.T. Rayonier Inc., 332 F. Supp. 309 (M.D. Fla. 1971); Mitchell v. Tenneco Chemicals, Inc., 331 F. Supp. 1031 (D.S.C. 1971); Enquist v. Quaker Oats Co., 327 F. Supp. 347 (D. Neb. 1971); Lavagnino v. Porto-Mix Concrete, Inc., 330 F. Supp. 323 (D. Colo. 1971); Bass Anglers Sportsman Soc. v. Scholze Tannery, Inc., 329 F. Supp. 339 (E.D. Tenn. 1971); United States ex rel. Mattson v. Northwest Paper Co., 327 F. Supp. 87 (D. Minn. 1971); United States v. Florida-Vanderbilt Development Corp., 326 F. Supp. 289 (S.D. Fla. 1971); Reuss v. Moss-American, Inc., 323 F. Supp. 848 (E.D. Wis. 1971); Bass Anglers

Sportsman's Soc. v. United States Plywood-Champion Papers, Inc., 324 F. Supp. 302 (S.D. Tex. 1971); Bass Angler Sportsman Soc. v. United States Steel Corp., 324 F. Supp. 412 (M.D. Ala. 1971), aff'd per curiam, 447 F.2d 1304 (5th Cir. 1971); Durning v. I.T.T. Rayonier, Inc., 325 F. Supp. 446 (W.D. Wash. 1970).

10/ Although in the Connecticut Action Now case and some of the other quit tam cases the plaintiff did not claim to be personally injured and would not have been able to recover compensatory damages in any event, the fact that plaintiff was personally injured has not changed the result in the cases which have presented the issue. See, e.g., Lavagnino v. Porto-Mix Concrete, Inc., supra.

11/ See also H. Christiansen & Sons, Inc. v. City of Duluth, 154 F.2d 205 (8th Cir. 1946), in which the Court expressed grave doubts concerning the existence of any federal question jurisdiction in a private suit under § 407 and concluded at 207:

The statute relied upon has particular reference to impeding or obstructing navigation. It is a penal statute and hence, must be strictly construed. It contains no provision for the recovery of damages for its violation. It does not on its face purport to establish a civil liability. It imposed a penalty as punishment for a wrong to the public. Any private right of action which exists under it is by implication only and would not in any event extend beyond the purposes of its prohibitions.

12/ In view of the absence of allegations relating to obstruction of navigation in this complaint, the Court

follows these cases insofar as they hold that the Act creates no private cause of action against a polluter. But it should be noted that reading the 1899 legislative history to distinguish obstruction of navigation from pollution is questionable in light of the Supreme Court's recent interpretations of the Act to encompass pollution as well as obstruction where the United States brings an enforcement action. United States v. Standard Oil Co., 384 U.S. 224 (1966); United States v. Pennsylvania Industrial Chemical Corp., 411 U.S. 655 (1973).

13/ See Guthrie, supra, 328 F. Supp. at 1145, citing Wyandotte Transportation Co. v. United States, 389 U.S. 191 (1967), for the proposition that "a principal beneficiary of the Act if not the principal beneficiary, is the Government itself."

14/ Note, Environmental Law -- Cause of Action Under Federal Common Law for Pollution of Interstate Waters, 77 Dick. L. Rev. 451 (1973); Note, Jurisdiction -- Federal Common Law Under 1331(a), 52 Neb. L. Rev. 301 (1973); McMahan, The New Federal Common Law, 13 For the Defense 83 (1972).

15/ "Interstate effect" is used here to mean pollution originating within one state adversely affecting another state. Of course, as a matter of constitutional power Congress can regulate pollution affecting interstate commerce as expansively as the modern reach of the commerce clause permits, and this power can be used to authorize private enforcement if Congress so chooses. But courts asked

to fashion a federal common law to adjudicate interstate disputes have usually done so only in contexts where the "interstate" nature of the dispute concerned states or state interests, rather than matters within interstate commerce in the constitutional sense. See Note, "The Case for a Federal Common Law of Aircraft Disaster Litigation," 51 N.Y.U.L. Rev. 231, 243, n. 84 (1976).

16/ See Byram River v. Village of Port Chester, N.Y.
394 F. Supp. 618 (S.D.N.Y. 1975), where the suit was brought to abate the depositing of inadequately treated sewage. The private plaintiffs included not only an individual and an association, but also the river itself. The requested relief, however, was equitable in nature.

RULING ON MOTION TO CERTIFY INTERLOCUTORY APPEAL

FILED

DEC 21 11 18 AM '76

U.S. DISTRICT COURT
NEW HAVEN, CONN.

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

WALTER PARSELL, ET AL :

V. :

CIVIL NO. B-700

SHELL OIL COMPANY, ET AL :

RULING ON MOTION TO
CERTIFY INTERLOCUTORY APPEAL

Plaintiffs have moved for an order in accordance with 28 U.S.C. § 1292(b) to amend the Court's Ruling of October 19, 1976, to certify that that Ruling involves a controlling question of law as to which there is a substantial ground for difference of opinion and that an immediate appeal may materially advance the ultimate termination of the litigation.

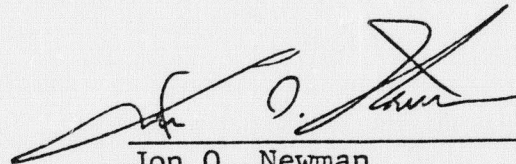
The legal question relating to federal question jurisdiction under 33 U.S.C. § 407 was left open by this Circuit in Connecticut Action Now, Inc. v. Roberts Plating Co., 457 F.2d 81 (2d Cir. 1972). The legal question of a private party's right to invoke federal jurisdiction to enforce a claim under a federal common law of pollution under Illinois v. Milwaukee, 406 U.S. 91 (1972), is the subject of much current dispute in judicial decisions and law review commentary. Furthermore, there is precedent for interlocutory appeal of an order concerning the right to trial by jury. Ross v. Bernard, 403 F.2d 909 (2d Cir. 1968), aff'd, 396 U.S. 531 (1970).

While this kind of discretionary certification might not be appropriate if the court trial could be expected to be brief, the parties have informed the Court that such is not the case. Plaintiffs' counsel has estimated that the trial will take approximately a month of court time, and that proving both liability and damages will require bringing witnesses -- including experts -- from as far away as California. Clearly a second trial with a jury, should the plaintiffs prevail on this issue after appeal from a final judgment, would create great hardship for all concerned.

Under the circumstances it is appropriate to grant the plaintiffs' motion. The October 19 Ruling on Motion to Strike Demand for Jury Trial is hereby amended by adding the following sentence:

This order involves a controlling question of law as to which there is substantial ground for difference of opinion, and an immediate appeal from this order may materially advance the ultimate termination of the litigation.

Dated at New Haven, Connecticut, this 21 day of December, 1976.



Jon O. Newman
United States District Judge

ORDER OF COURT OF APPEALS GRANTING LEAVE TO
APPEAL PURSUANT TO 28 U.S.C. §1292(b)

76-8549

C 65

UNITED STATES COURT OF APPEALS

Second Circuit



At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-eighth day of January, one thousand nine hundred and seventy-seven.

Walter Parsell, et. al.,

Plaintiffs-Appellants,

v.

Shell Oil Company & Buckley Bros.,

Defendants-Appellees.

It is hereby ordered that the motion made herein by counsel for the

~~appellant~~

~~appellee~~

petitioner

~~respondent~~

by notice of motion dated December 28, 1976 for leave to appeal pursuant to 28 USC §1292(b)

be and it hereby is granted

~~denied~~

It is further ordered that

ROBERT P. ANDERSON, by J.L.O.

JAMES L. OAKES,

MURRAY I. GURFEIN

Circuit Judges

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

JULIO VALLEJO, JR., being duly sworn,
deposes and says that deponent is not a party to the action,
is over 18 years of age and resides at 703 REMSEN AVE.
BROOKLYN, NYC.

That on the 27 day of APRIL, 1977,
deponent personally served the within JOINT APPENDIX

upon the attorneys designated below who represent the
indicated parties in this action and at the addresses below
stated which are those that have been designated by said
attorneys for that purpose.

By leaving true copies of same with a duly
authorized person at their designated office.

By depositing 1 true copies of same enclosed
in a postpaid properly addressed wrapper, in the post office
or official depository under the exclusive care and custody
of the United States post office department within the State
of New York.

Names of attorneys served, together with the names
of the clients represented and the attorneys' designated
addresses.

PULLMAN, COMLEY, BRADLEY & REEVES
ATTORNEYS FOR DEFENDANTS - APPELLEES
855 MAIN STREET
BRIDGEPORT, CONN. 06604

Sworn to before me this

27 day of April, 1977

Michael Desantis
MICHAEL DESANTIS
Notary Public, State of New York
No. 03-0330303
Qualified in Queens County
Commission Expires March 30, 1979

Julio Vallejo Jr